

STATE OF MAINE  
PUBLIC UTILITIES COMMISSION

Docket No. 96-537

December 2, 1997

CENTRAL MAINE POWER COMPANY  
Application to Invest Funds in  
Telecommunications Project and  
Approval of Related Affiliated  
Interest Transactions

ORDER REGARDING  
PUBLIC UTILITY  
STATUS

WELCH, Chairman; NUGENT and HUNT, Commissioners

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**I. SUMMARY**

In this Order, we find that FiveCom of Maine LLC (FCM) is not a public utility under Maine law because its proposed operations in Maine indicate that it is not holding itself out to provide service to the public or a particular segment of the public.

**II. BACKGROUND**

On October 1, 1996, Central Maine Power Company (CMP) filed an application to invest funds in telecommunications projects and to enter certain affiliated interest transactions. Specifically, CMP sought approval for the creation of an affiliate, FiveCom of Maine, to facilitate the construction of a fiber optic telecommunications network within its electric transmission and distribution system right of ways. FCM's business plan is to provide its fiber optic network capacity to telecommunications carriers through individually negotiated contracts.

On March 7, 1997, the Commission issued an Order Approving Stipulation (Part II) allowing FCM to be created and approving associated affiliated transactions. The stipulation explicitly reserved for further litigation the issue of whether FCM would be a public utility under Maine law by virtue of its planned operations in Maine. The Commission's Advisory Staff (Advisors) issued two sets of data requests addressing FCM's claim that it should not be determined to be a public utility under Maine Law. FiveCom's responses to these data requests are considered part of the record in this matter. A technical conference in this matter was held on August 13, 1997.

On October 6, 1997, CMP, FCM and the Public Advocate presented a stipulation regarding the public utility status

issue. The stipulating parties agreed that FCM should not be found to be a public utility because it plans to provide its fiber optic network capacity only to entities that provide telecommunications services to the public. On October 6, 1997, the independent telephone intervenors filed a letter, stating that they take no position on the merits of the stipulation.

### III. DISCUSSION

Based on the representations as to the business FCM will conduct in Maine, we find that it is not a public utility under Maine law. The stipulation on this issue appears to conclude that FCM is not a public utility because it will provide facilities only to telecommunications providers and not directly to customers at retail. We do not find this to be a sufficient reason alone to conclude that FCM is not a public utility; the definition of public utility under Maine law does not make any distinction based on wholesale or retail service. 35-A M.R.S.A. § 102(19). Moreover, we have historically regulated the wholesale (access) rates of telephone utilities that provide both retail and wholesale service. Instead, we make our finding on the basis of information in the record as to the manner in which FCM will conduct its business in Maine.

The Law Court has held that for an entity to be a public utility it must satisfy what has become known as the "public use" test. *Gilman v. Somerset Farmers Cooperative Telephone Company*, 129 Me. 243, 247 (1930). The Commission has described the public use test as:

The test of a public utility is whether or not such a person holds himself out expressly or impliedly as engaged in the business of supplying his product or service to the public as a class or to any limited portion of it, as contradistinguished as holding himself out as serving or ready to serve only particular individuals. The public or private character is not dependent upon the number of persons by whom used, but whether open to use and service of all members of the public to the extent of its capacity.

*New England Telephone Company*, Docket No. 84-208 at 3 (Me. PUC June 20, 1985). In *Gilman*, the Law Court described the public use test as follows:

The test, then, as to whether telephone service is being furnished by a public utility, is whether the owner or operator

furnishing the service has the right to transmit, and is ready to transmit conversations and messages, not necessarily for the benefit of the whole public or even a large part thereof, but to all parties similarly situated without partiality or unreasonable discrimination, in equality of right, to the extent that capacity may admit of use, for compensation.

*Gilman*, 129 Me. at 247.

Based on the record, FCM will be providing its fiber optic network capacity to individual entities, rather than any particular segment of the public. It does not plan to make its services available to all certificated carriers on universally applicable terms and conditions. It will individually negotiate prices and terms and enter particularized contracts with individual certificated carriers which FCM has determined have the financial resources to perform the contract obligation, the technical competence to support the product that FCM is providing, and the operational ability to support the customers they seek to serve. FCM Response to Advisors Data Request No. 2. FCM will not offer standardized contracts or service to potential customers and, thus, will not hold itself out as willing to provide service on similar terms to all entities that are similarly situated. For these reasons, we find that FCM's activities in Maine do not satisfy the public use test. Accordingly, we conclude that FCM is not a public utility.

Dated at Augusta, Maine this 2nd day of December, 1997.

BY ORDER OF THE COMMISSION

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Dennis L. Keschl  
Administrative Director

COMMISSIONERS VOTING FOR:      Welch  
   Nugent  
   Hunt

## NOTICE OF RIGHTS TO REVIEW OR APPEAL

5 M.R.S.A. § 9061 requires the Public Utilities Commission to give each party to an adjudicatory proceeding written notice of the party's rights to review or appeal of its decision made at the conclusion of the adjudicatory proceeding. The methods of adjudicatory proceedings are as follows:

1. Reconsideration of the Commission's Order may be requested under Section 6(N) of the Commission's Rules of Practice and Procedure (65-407 C.M.R.11) within 20 days of the date of the Order by filing a petition with the Commission stating the grounds upon which consideration is sought.

2. Appeal of a final decision of the Commission may be taken to the Law Court by filing, within 30 days of the date of the Order, a Notice of Appeal with the Administrative Director of the Commission, pursuant to 35-A M.R.S.A. § 1320 (1)-(4) and the Maine Rules of Civil Procedure, Rule 73 et seq.

3. Additional court review of constitutional issues or issues involving the justness or reasonableness of rates may be had by the filing of an appeal with the Law Court, pursuant to 35-A M.R.S.A. § 1320 (5).

Note: The attachment of this Notice to a document does not indicate the Commission's view that the particular document may be subject to review or appeal. Similarly, the failure of the Commission to attach a copy of this Notice to a document does not indicate the Commission's view that the document is not subject to review or appeal.